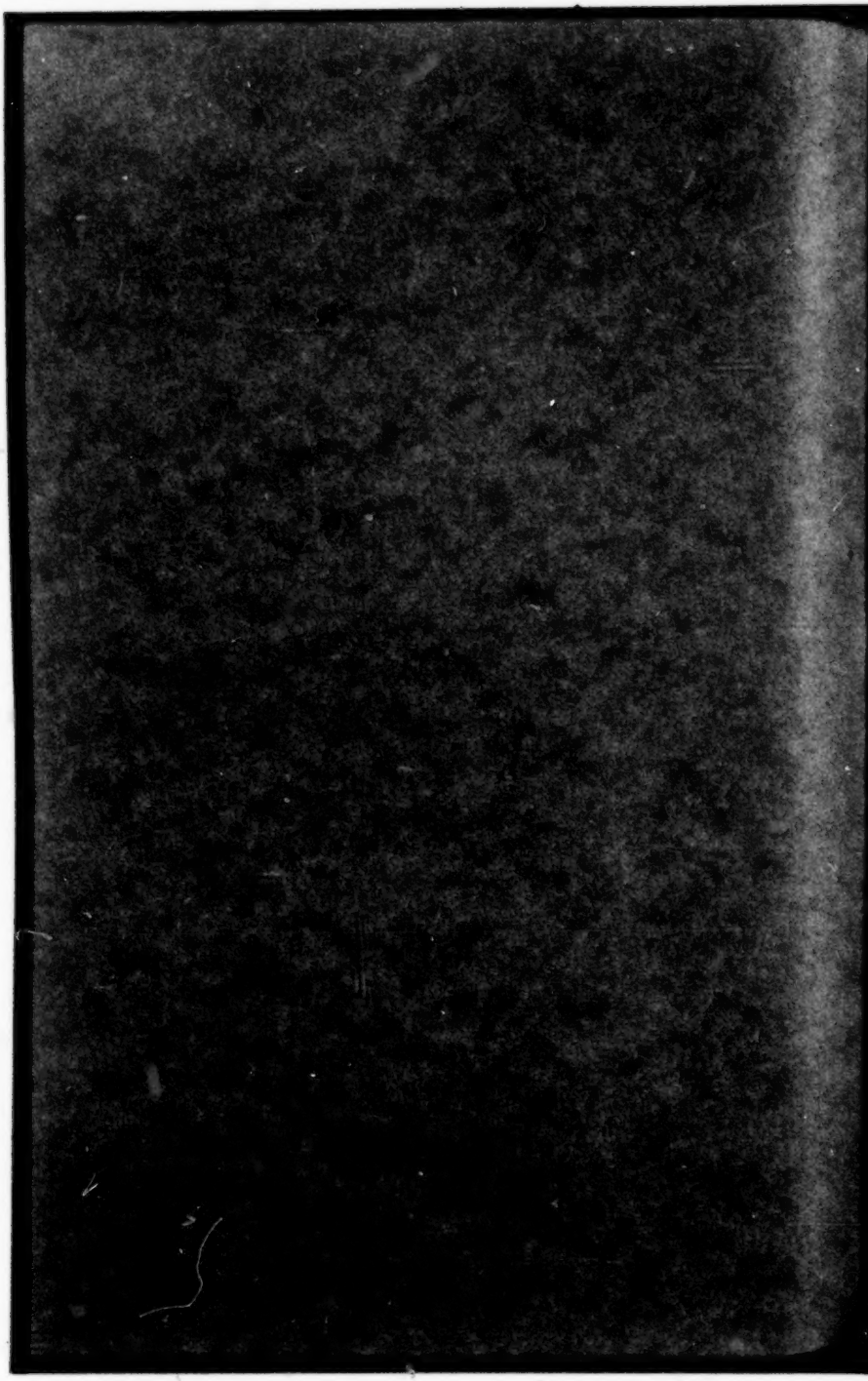

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Supreme Court of the United States

October Term, 1926.

NUMBER 342

C. J. LONGEST, APPELLANT,

vs.

W. C. LANGFORD AND G. N. PUCKETT,
APPELLEES.

MOTION TO DISMISS.

Comes now the defendants in error, appellees, and move this Honorable Court to dismiss this cause for want of jurisdiction to consider the same. The grounds for this motion are:

I. This is not a cause which plaintiff in error is entitled to have considered by the United States Supreme Court upon a writ of error.

II. This cause does not involve a substantial Federal question such as to entitle plaintiff in error, appellant, to a review by the Supreme Court of the United States.

I. This is not a cause which appellant is entitled to have considered on a writ of error.

This cause is brought here upon a writ of error to the Supreme Court of Oklahoma (Tr. R., pp. 7-8). This cause was filed in this Court during the year 1926, at which time

the jurisdiction was governed by the Act of February 13, 1925 (43 St. 936), amending Section 237 of the judicial code as follows:

"Sec. 237: a. A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or a statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any state, on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ.

"b. It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review

under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied Nothing in this paragraph shall be construed to limit or detract from the right to review by writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

"c. If a writ or error be improvidently sought and allowed under this section in a case where the proper mode of invoking a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the writ or error was allowed shall be regarded and acted on as a petition for certiorari and as if fully presented to the Supreme Court at the time they were presented to the court or judge by whom the writ of error was allowed; provided; that where in such a case there appears to be no reasonable ground for granting a petition for certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs, as provided in section 1010 of the Revised Statutes."

This case does not involve the validity of a treaty or a statute of the United States or the validity of a statute of a state. Appellant in his brief (p. 12) admits that the Act of Congress of May 2, 1890 (26 St. L. 81), put in force in the Indian Territory certain chapters of Mansfield's Digest of the Statutes of Arkansas, among the number being Chapter 20, which provided for the application of the common law in the Indian Territory. Likewise it is not controverted that section 22 of the Act of Congress July

1, 1902, provided for the devolution of land, in accordance with Chapter 49 of Mansfield's Statutes of Arkansas. The only contention is that Chapter 49 did not provide for curtesy. There is no question presented of the validity of a treaty or statute of the United States with an adverse decision thereon or the validity of a state statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States with a decision in favor of its validity. The question, being one of the interpretation of the Arkansas statute of descent and distribution, is obviously not a case of which this Court will take jurisdiction upon a writ of error.

II. This case does not contain a substantial Federal question.

Should this Court hold that the amendment to the Judicial Code above quoted permits the court to consider a writ of error as a petition for certiorari, the case does not contain a substantial Federal question, and no reasonable ground exists for granting certiorari.

Reference to the assignments of error (Tr. R. p. 5), propositions argued in brief of appellant (brief p. 10) and answer of appellant in the trial court (Tr. p. 12), clearly indicate that the only question involved is the proper construction of the Arkansas law of descent and distribution. The opinion of the Supreme Court of Oklahoma (Tr. R. p. 47) and the dissenting opinion of Mr. Justice

Branson (Tr. R. p. 53) clearly indicate that the real question decided was whether Chapter 49 of Mansfield's Digest of the Statutes of Arkansas provided for an estate by curtesy, under the facts stated in the opinion.

Counsel for appellant (brief, p. 12) states that the basis fof curtesy in the Indian Territory was the act of Congress, May 2nd, 1890 (26 Stat. L. 81), which put in force certain of the laws of Arkansas, among the number being Chap. 20 of Mansfield's Digest (a portion of Sec. 566 is quoted in brief at page 13). Section 22 of the Act of Congress July 1, 1902, ratified September 25, 1902, known as the Supplemental Agreement, provided:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement, the lands to which such person would have been entitled, if living, shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent ond distribution as provided in Chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas."

The laws of Arkansas had been put in effect in 1890, and in 1902, the Act of Congress made specific provision for the members of the tribes who should die between the date of enrollment and selection of allotment and again in specific terms the law of descent and distribution of the State of Arkansas is made applicable.

It is immaterial for the purpose of this motion which

of the above acts, or if both of them, put into force the statutes of Arkansas in the Indian Territory. It is undisputed that the Arkansas law of descent and distribution was put into force by act or acts of Congress. The Arkansas law being admitted to be in force the questions here raised concern the construction of an Arkansas act and should be treated as involving only a local law.

It is well established by the decisions of this Court that it will not review decisions of state courts based on local or general law not involving substantial federal questions (27 R. C. L., p. 79).

> "Save in exceptional circumstances, the United States Supreme Court must accept as controlling a decision of the State Court on questions of local law, both statuatory and common." *Amr. Ry. Express Co. v. Commonwealth of Ky.*, No. 5, decided Feb. 21, 1927, 47 S. Ct. 453.

The exceptional circumstances are further defined in said opinion as being "merely arbitrary or capricious exercise of power" and their decision states that "mere erroneous decision given by a state court in regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law" and likewise, the mere erroneous decision of the state court construing a statute put into effect by the Federal government does not constitute a federal question.

Under the legislation of Congress the lands of Indian allottees of the Five Civilized Tribes are made one of local law. Mrs. Puckett having died in 1903, prior to admission of Oklahoma as a state in November 1907, the descent and distribution of her allotted lands should be according to Mansfield's Digest of the laws of Arkansas. Such legislation discloses a uniform policy on the part of Congress to provide that the descent and distribution of such lands upon the death of the allottee, shall be subject to general local laws of descent and distribution of a state or territory in which the allotment is situated, and the mere fact that such general local laws were put into force by Act of Congress are none the less local territorial legislation, there being no local legislative body in Indian Territory, as in organized territories, and are quite distinguishable from other acts of Congress, of a different character (*Parker* v. *Oklahoma Oil Co.*, 218 Fed. Rep. 380).

A suit involving rights to land acquired under a law of the United States does not arise under that law unless it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of such law, upon the determination of which the result depends.

In *Shulthis* v. *McDougal*, 225 U. S. 561, 56 L. ed. 1205, 32 S. Ct. 704, this Court said:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily,

> or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends. This is especially so of a suit involving the rights to land acquired under a law of the United States. If it were not, every suit to establish title to land in the central and western states would so arise" (citing cases).

It will be noted that the answer of the appellant (defendant below) makes no mention of the acts of Congress or any controversy respecting their validity, construction, or effect (Tr. R. p. 12).

Counsel in Shulthis vs. McDougal pointed out the statutes of Congress relating to the allotment in severalty of lands of the Creek Nation, the leasing and alienation thereof after allotment, and making of allotments to the heirs of deceased children, and the rights of the heirs, collectively and severally, under such allotments; but the bill made no mention of any controversy respecting their validity, construction or effect.

> "So looking to the bill (answer) as we have seen that we must, it cannot be held that the case as therein stated was one arising under the statutes mentioned" *Shulthis* v. *McDougal*, *supra*.

A brief statement of the above case will emphasize its applicability to the question here raised. One Andrew J. Berryhill was the son of George Berryhill, a member

of the Creek Nation of the mixed blood, and Clementine Berryhill, his wife, a non-citizen of that tribe. He was born on the 6th day of May, 1901, and died in the month of November of that year leaving no brothers or sisters surviving him. At no time during his life was he entitled to enrollment as a member of the tribe, or to an allotment of its property. After his death, by the supplemental agreement entered into between the Commission to the Five Civilized Tribes and commissioners of the Creek Nation (Act of June 30, 1902, c. 1323, 32 St. 501) proclaimed by the President August 8, 1902, it was provided in section 7 as follows:

> "All children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May, 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission."

Andrew J. Berryhill met precisely the conditions of this agreement. He died, however, before the agreement was entered into, as already stated. But the agreement further made express provision for such a contingency in section 7, as follows:

> "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs, as herein provided, and be allotted and distributed to them."

The phrase "as herein provided" refers to Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which deals with the subject of heirship and descent. *Shulthis* v. *McDougal*, 170 Fed. 529, (dismissed for want of jurisdiction 225 U. S. 561).

It will be noted that the lands in the above case were the allotment of Andrew J. Berryhill, deceased, and the facts of that case are similar to those of the case at bar. It is apparent to the court that the acts of Congress providing for the enrollment, allotment and descent in the above case are almost identical with the instant case. We believe the law stated therein is controlling and this case should be dismissed for want of jurisdiction.

The Supreme Court of Oklahoma, in *Seiffert* v. *Jones*, 77 Okla. 294, 186 Pac. 472, held that the sixty-day proviso contained in the Act of Congress May 27, 1908, was applicable to allotted land and not to inherited lands. On writ of error to the Supreme Court of Oklahoma said cause was dismissed by this Court for want of jurisdiction (*Jones* v. *Seiffert*, 257 U. S. 618, 42 S. Ct. 95).

A controversy in respect of lands has never been regarded as presenting a Federal question merely because one of the parties to it has derived his title under an act of Congress (*Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571, 20 S. Ct. 222.

The objection to an exercise of authority under a statute, or a contention that there has been an erroneous interpretation is not sufficient to support a writ of error to a state court where the validity of the statute is not attacked.

Jett Bros. Distilling Co. v. *City of Carrollton*, 252 U. S. 1, 40 S. Ct. 255, 64 L. ed. 421.
Champion Lbr. Co. v. *Fisher*, 227 U. S. 445, 33 S. Ct. 329, 57 L. ed. 591.
Stadelman v. *Miner*, 246 U. S. 544, 38 S. Ct. 359, 62 L. ed. 875.

In *Perryman* v. *Woodward*, 238 U. S. 148, 35 S. Ct. 830, 59 L. ed. 1242, this Court passed upon the question of whether a certain section of the laws of Arkansas extended over the Indian territory, and said:

"Whether the section was in force is the main question in the case; and as this is, in effect, a question whether the Act of Congress adopted it, it may, without much stretching be regarded as open to review in this court, although if it were one degree more remote, *and concerned the construction of an Arkansas Act admitted to be in force it would be treated as involving only a local law.*"

Conclusion.

We conclude that the question involved in this cause is one which involves the interpretation of a statute admitted to be in effect, involving the construction of a local law, and that it does not involve a dispute or controversy

respecting the validity, construction, or effect of an Act of Congress, and that the cause should be dismissed for want of jurisdiction.

W. F. Semple,
Durant, Oklahoma.

S. Russell Bowers,
Washington, D. C.

Guy Greer,
Robert R. Pruet,
Waurika, Oklahoma.

Supreme Court of the United States

October Term, 1926.

NUMBER 342

C. J. LONGEST, APPELLANT,

vs.

W. C. LANGFORD AND G. N. PUCKETT, APPELLEES.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case in the court below is *Longest* v. *Langford*, 114 Okla. 150, 242 Pac. 569. Counsel for appellant has omitted matters in the statement of pleadings which we deem important. The answer of the defendant (appellant) makes no mention of any controversy as to the validity, construction, or effect of an act of Congress, treaty of the United States, or the invalidity of a state statute (Tr. R. p. 12). The answer of the defendant in the trial court (appellant) alleged that C. J. Longest was the owner of two fifths interest in and to the lands sued for by the plaintiff by deeds from children of the said Mary E. Puckett, deceased and admitted "that the plaintiff was the owner of a three-fifths interest in and to said land," ob

tained from three of the children of Mary E. Puckett, deceased (Tr. R. 12). The Supreme Court of Oklahoma decided that appellees were entitled to possession under and by virtue of an estate of curtesy and upon the termination thereof appellee would be a tenant in common with appellant, the one owning a three-fifths interest and the other a two-fifths interest in the remainder.

ARGUMENT.

One Major Question Stated.

There was no dispute as to the material facts in the trial court or the Supreme Court of the State of Oklahoma. Reference to the points relied upon by appellant in his argument and assignments of error disclose that the sole question was whether G. N. Puckett, the surviving husband of Mary E. Puckett, an intermarried citizen of the Choctaw Tribe of Indians, was entitled to an estate by curtesy, under the Arkansas Law of Descent and Distribution, put in force and effect by the Acts of Congress, it being admitted that there was a lawful marriage, the birth of issue capable of inheriting, said allottee having been duly enrolled during her lifetime and said allotment having been selected after the death of the allottee.

Appellee W. C. Langford is the owner by regular conveyance of all the right, title and interest of the said G. N. Puckett in and to the lands in controversy. G. N.

Puckett and his grantee W. C. Langford were entitled to possession under and by virtue of an estate of curtesy under the applicable provisions of Mansfield's Digest of the Statutes of Arkansas, placed in force and effect as the Law of Descent and Distribution of the Indian Territory by acts of Congress.

Equality of Members of Tribes in Distribution of Tribal Property.

It was not the intention of Congress to create any inequalities among the citizens whose names should appear upon the rolls, but that each one should participate in the same manner and to the same extent in the distribution of the tribal property whether selection had been made before or after the death of the allottee. In this connection we desire to call the court's attention to the several applicable statutes and the decisions of the courts charged with the interpretation and application of the same.

Section 22, of the Act of Congress July 1, 1902, approved September 25, 1902, known as the Choctaw Chickasaw Supplemental Agreement, provided:

> "If any person whose name appears on the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property descend to

his heirs according to Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

Section 5, of the Act of Congress of April 26, 1906, provides:

> "That all patents of deeds to allottees, in any of the Five Civilized Tribes to be hereafter issued, shall issue in the name of the allottee, and if such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs, or his lawful assigns, as if patent or deed had issued to the allottee during his life, and all patents heretofore effective, shall be given like effect; and all patents or other deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner of the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same."

And section 32, of the Act of Congress June 25, 1910, reads:

> "Where deeds to tribal lands in the Five Civilized Tribes have been or may be issued, in pursuance of any tribal agreement or Act of Congress, to a person who had died or who hereafter dies before the approval of such deed, the title to the land designated therein shall inure to and become vested in their heirs, devisees, or assigns of such deceased grantee as if the deed had issued to the deceased grantee during life."

These provisions have been construed by this Honorable Court and the Circuit Court of Appeals. This court,

in the case of *Harris* v. *Bell*, 254 U. S. 103, discussing the effect of subsequent legislation upon section 22, *supra*, said:

> "Section 5 of the same (Act 1906) directed that all patents or tribal deeds for allotments should be issued 'in the name of the allottee' meaning the member in whose right the allotment was made and provided that if he were then dead the title should inure to and vest in 'his heirs as if the patent or deed had issued to the allottee during his life.' A like provision is found in section 32 of the Act of June 25th, 1910."

The Circuit Court of Appeals, in construing the effect of Section 5 of the Act of April 26, 1906, *supra*, upon Section 22, of the Act of Congress July 1, 1902, *supra*, said:

> "Here is an express declaration by Congress that the land shall descend to the heirs the same as it would have descended if patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by Congress of its own acts leaves no room for doubt" (*Shulthis* v. *McDougal*, 170 Fed. 529).

As early as June, 1909, the Circuit Court of Appeals announced the doctrine that there should be no difference in the devolution of property or the persons who should take, whether the selection had been made before or after the death of the allottee. *Shulthis* v. *McDougal*, *supra*, decided two major questions. First: that the estate was ancestral and not a new acquisition. Second: that after des-

cent had been cast the statute of descent and distribution should be applied as if patent had issued and the allottee had been seised thereof during his lifetime.

This case was dismissed by the Supreme Court for want of jurisdiction, as pointed out in our motion to dismiss this cause, but in *McDougal* v. *McKay*, 237 U. S. 372, this Court, in a case involving a part of the same allotment to Andrew J. Berryhill, said:

> "We recognize the unusual difficulties surrounding the problem presented upon the record, and appreciate the very forceful argument offered in support of the conflicting theories. The circumstances are novel, and the canons of descent are not precisely applicable thereto; but these rules must be accommodated to the facts; and the great purpose of Congress effectuated as nearly as may be. And not only would it be improper for us to disregard the effect of the decisions already announced by the Circuit Court of Appeals, and the Supreme Court of Oklahoma, which are supported by cogent reasoning, but considering the peculiar and rapidly changing conditions within that state, a special consideration must be accorded to them."

Since the decision of the Circuit Court of Appeals, *supra*, the Supreme Court of the State of Oklahoma has reiterated the statement that when descent is cast, the statute of descent and distribution will be applied as if the deceased had died seized of the allotment.

Ned v. *Counliss*, 84 Okla. 138.
Homer v. *Lester*, 95 Okla. 284.

Ground v. *Dingman*, 33 Okla. 760.
Marley v. *Fewell*, 32 Okla. 152.
Barnett v. *Way*, 29 Okla. 780.
Brady v. *Sizemore*, 33 Okla. 169.
Moffett v. *Conley*, 63 Okla. 3.
Cook v. *Childs*, 49 Okla. 321.
Shellenberger v. *Fewell*, 34 Okla. 94.
Rentie v. *McCoy*, 35 Okla. 77.

It is admitted that G. N. Puckett and Mary E. Puckett were legally married, that issue was born capable of inheriting and that Mary E. Puckett was dead. Applying the uniform holdings of the Circuit Court of Appeals and the Supreme Court of Oklahoma that the interest of the allottee descended, the same as if patent had issued in the lifetime of Mary E. Puckett, curtesy would attach as a matter of course.

Rule of Property.

The above cases had been acquiesced in and acted upon since 1909, and the holding that no distinction was to be made in the descent whether the allottee died before or after selecting his allotment has become a rule of property which, recognizing the importance of the security of titles, should not be disturbed, and as said in *McDougal* v. *McKay*, *supra*, considering the conditions "a special consideration must be accorded to them."

These statutes and decisions applied the law of descent and distribution the same as if the deceased al-

lottee had received title (certificate of selection) and died seized of his allotment.

Counsel for appellant is in error in contending that there was no descendible interest prior to the selection of an allotment.

> "The interest of the allottee was a descendible interest. By the Supplemental Agreement of 1900, in the case of the death of a member of the tribes after December 31, 1899, the lands 'to which he would have been entitled if living' were to descend to his heirs. Section 5 of the Act of April 26, 1906, relating to 'patents or deeds to allottees in any of the Five Civilized Tribes' to be thereafter issued, thus including those to be issued to the Seminole allottees, provided that if any such allottee should die before the deed became effective the title to the lands described therein should 'inure to and vest in his heirs' and further, that 'in case any allottee shall die after restrictions have been removed his property shall descend to and vest in his heirs' or lawful assigns as if the patent or deed had issued to the allottee during his life" (*Goat v. United States*, 224 U. S. 458, 32 S. Ct. 544).

There would appear to be no distinction between a descendible interest and an estate of inheritance. Unless there was a descendible interest no kinsman of the deceased allottee could inherit.

The Supreme Court of Oklahoma, in *Moffet v. Conley*, 63 Okla. 3, after a critical analysis of the basic principles underlying all character of estates reached the conclusion that the right of kinsmen to the lands of an ancestor se-

lected after such ancestor's death, was received by right of representation, and that it was not necessary that technically the land descend to the heirs and for it was sufficient to say that it came in the nature and course of descent. "At common law, descent or hereditary sucession is the title whereby a man on the death of his ancestor acquired his estate by right of representation, as his heir at law. An heir therefore is he upon whom the law casts an estate immediately upon the death of the ancestor; and an estate, so descending to the heir, is in law called an inheritance."

No distinction is made by the acts of Congress or the judicial interpretation thereof between the heirs of an Indian who died before making his selection of an allotment and one who died thereafter. The Act of Congress implies that in case of those dying before receiving allotments that the lands should pass to the same persons, and in the same proportion, as it would have passed if the person had died seized thereof. If there were no inheritable or descendible interest prior to selection of allotment there could be no inheritance; escheat would be inevitable. The act of Congress removed this condition and provided that the heir should take the same as if he (the allottee) had received patent in his lifetime. It is conceded that the issuance of patent is seisin in law. As was in said in *Cook v. Childs, supra*:

"But for these provisions, the heirs themselves would have no right thereto by virtue of the fact that they stand in the relation of kinsmen of deceased; and their rights to participate in the distribution depends wholly upon these provisions and attached to the property at the time of selection."

Cases City by Appellant Apply to Curtis Act Allottees.

Counsel for appellant cite several cases in which the statement is made that prior to selection of allotment the allottee was seized of no inheritable estate. But these cases are clearly distinguishable from the case at bar. This language was used in determining what law governed the devolution of the property, and it was held that the date of selection of the allotment determined the law of descent applicable, but, the descent having been cast, the heirs are identified as being the persons in esse at the date of the death of the allottee, who were entitled to take, at the death of the allottee, under the applicable statute.

A further distinction appears in that each and every one of the cases cited arose as to the kind and character of title, if any, which an allottee had under the Curtis Act.

"Therefore, both the allotment and the death of the allottee, occurred within the period during which Sec. 11 of the Curtis Act was in force in the Creek Nation, by the terms of which the commission was directed, upon the completion of the citizenship roll and the survey of lands of the tribes, to proceed to allot the exclusive use and occupancy of the surface

of all lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by the roll, giving to each, so far as possible, his fair and equal share thereof * * *.

"Having regard, therefor, merely to the language employed in Section 11 of the Curtis Act and the contest, there is no foundation for the contention that allottees thereunder took any assignable or inheritable interest in the land or anything more than an exclusive right to possess and enjoy the surface of the land during the lifetime of the occupant.

"And the manifest purpose of the Curtis Act was not to displace but to recognize the communal titles, and to administer the use of the lands for the equal benefit of the members of the tribes according to the true intent and meaning of the early treaties; the effect being to do what the tribal governments ought to have done, but were failing to do."

Further on in the opinion the court discussed the modification wrought by the adoption of the original Creek Agreement and said:

"It is perhaps unnecessary to say that the subsequent issue of patent to the 'heirs of Agnes Hawes' without naming them, conveyed the legal title to those persons upon whom the equitable title was conferred by the original Creek Agreement" (*Woodward* v. *De Graffenreid*, 238 U. S. 284).

Each member of the tribe had an equitable interest, after the adoption of the Supplemental Agreement, Act, July 1, 1902, in and to his allotment thereafter to be received. Mary E. Puckett had been duly enrolled and the Supplemental Agreement had been adopted and every-

thing done necessary to entitle her to an allotment of land and by the adoption of this agreement and the completion of her enrollment she had an equitable title to the allotment to which she was entitled. As a condition precedent to receiving an allotment in severalty it was necessary to relinquish all claim to the communal tribal property. Upon the enrollment of Mary E. Puckett and the adoption of the Supplemental Agreement she became vested with an equitable estate.

Any apparent conflict in the cases cited by counsel for appellant and those on which we rely is dissipated by the decision of the Supreme Court of Oklahoma, in *Homer v. Lester, supra*:

> "While the heirs of Thomas J. Taylor, technically speaking, did not inherit the allotment, it did come to them in the nature of an inheritance, for they had to be heirs of Thomas J. Taylor in order to take the land, and for the purpose of ascertaining, under the law of descent and distribution, who became his heirs, the land will be treated as having been inherited by his heirs. In applying the law of descent, and in applying the provisions of section 22 of the Act of Congress, 1906, no distinction is made between lands technically inherited and lands allotted to heirs, except the descent is not cast until the allotment is selected, as held in *Sizemore v. Brady*, 225 U. S. 441, *McKee v. Henry*, 201 Fed. 74, and several opinions by this Court following that doctrine. Nevertheless, when the descent is cast, this Court has repeatedly held that the statutes of descent and distribution will

be applied as if the deceased died seized of his allotment."

This Court has approved the doctrine announced by the Oklahoma Supreme Court in *Washington* v. *Miller*, 235 U. S. 442, in which it is said:

> "This section as a whole shows that it looked to the future no less than to the present, and was intended to prescribe a rule of descent applicable to all Creek allotments."

This case holds that no different rules should be applied in cases where allotments were selected prior to or after the death of the allottee. No distinction is or should be made in the devolution of the estate under Mansfield's Digest of the Statutes of Arkansas, whether the allotment was selected before or after the death of the allottee.

No Different Seisin Required for Curtesy than Other Estates of Inheritance; There was a Seisin in Fact and in Law.

Counsel for appellant contends that Mary E. Puckett did not have the character of seisin essential to the attaching of curtesy in favor of her surviving husband. It would be inaccurate to attempt to measure the seisin required for an inheritable estate in this country by the rules of the ancient common law. The original object of seisin, which was evidenced by livery of seisin, by twig or turf, was to evince notoriety to the neighborhood. *Green* v. *Liter*, 8 Cranch 229. But the rule has been much relaxed and in many jurisdictions seisin in law is now suf-

ficient even where the lands are in adverse possession of another. 8 R. C. L. 380. "Seisin was originally the completion of the feudal investiture. In American Jurisprudence it means, generally, ownership. The covenant of seisin and the covenant of right to convey are synonymous." *McNitt* v. *Turner*, 83 U. S. 352. In the case of *Green* v. *Liter*, *supra*, discussing the powers of the Virginia assembly to vest title in its patentees, it is said: "It cannot be doubted that the legislature were competent to give their patentees a perfect title and possession without actual entry."

In view of modern methods of acquiring and conveying landed estate it certainly will not be contended that Congress, in the exercise of its plenary power to legislate for the Indians might not dispense entirely with any or all of the conditions and formalities of the vesting of title to the individual allotment of the deceased Indian. This is the practical effect of the provisions of section 22, *supra*, providing that lands shall descend to his heirs and it is immaterial whether the process be styled a seisin in law, or a seisin by operation of law, whatever designation may be used, it is apparent that the doctrine of *Shulthis* v. *McDougal*, *supra*, followed since 1919 and approved by the Supreme Court of Oklahoma and the Supreme Court of the United States, is the only method by which the scheme of allotment could be carried out and the members of the

tribes and their descendants share equally in the lands and other property belonging to the tribes in common. In *Harris* v. *Bell, supra,* it is said: "Titles should inure to and vest in his heirs as if deed or patent had issued to the allottee during his lifetime." There is a clear and distinct expression of this Court that the character of seisin was immaterial, the same persons taking as if patent had issued during the life of the allottee.

Seisin Sufficient to Vest an Estate of Curtesy.

Prior to the date of the ratification of the supplemental Treaty, the lands of the Choctaws and Chickasaws were owned in common and the citizens of the Nation had the absolute right to occupy any of the common lands of the Tribes without any restrictions as to the number of acres or the particularr place where the land might be selected; the members enjoyed the unusual right to occupy any land not fenced and claimed by any other member of the Tribes.

The doctrine of common ownership of land has come down in the history of the Choctaws as one of the sacred rights, and it was with great reluctance that the Tribes were induced to surrender the right of common ownership and accept allotments of land in severalty. In 1894 Congress created what has been known as the Dawes Commission and clothed it with power to proceed to the Five Civilized Tribes residing in the Indian Territory with the

single view of persuading them to negotiate treaties and surrender their common ownership of land and accept allotment in severalty.

There were but few families in the Choctaw and Chickasaw Nations who did not have claim to the possession of lands, and who had not occupied certain lands for several years prior to the date of the ratification of the Supplemental Agreement. The individual members of the Tribe had been receiving their proportionate share of the rents from leased lands and their proportionate share of the moneys derived from townsites and from mineral lands which was equivalent to the common law requirement of taking rents. Each member had been enjoying the benefits of the rents and profits from the tribal lands. After the adoption of the Supplemental Agreement and the enrollment of the allottee the members of the tribe had an equitable interest in and to the allotment thereafter to be selected. *Woodward* v. *De Graffenreid, supra*. There was therefore a seisin in fact which seems to us should answer every purpose and requirement of the Arkansas statute, and this was certainly in the minds of the framers of the Supplemental Treaty, because they took particular pains in that treaty to provide that the lands allotted to members who might die after the ratification of the Supplemental Treaty should descend to the heirs in accordance

with the applicable provisions of Mansfield's Digest of the Statutes of Arkansas. It is difficult to conceive how language could be made more accurate in stating the purpose of the framers of the treaty. They said in substance that the land should descend as if selection had been made in the lifetime, and that the heirs should be identified in accordance with the controlling provisions of Mansfield's Digest of the Statutes of Arkansas.

It was not the intention of Congress to create any inequalities among the citizens whose names should appear upon the rolls, but that each one should participate in the same manner and to the same extent in the distribution of tribal property whether selection had been made before or after the death of the allottee. It was never intended that two citizens duly enrolled, each of whom was entitled to share in the tribal property, where one had selected her allotment and died, her husband would be entitled to curtesy in the allotment of his deceased wife, and the husband of another who died before making her selection should be excluded, even though she died in point of time later than the one who, in fact, made her selection.

Specific Application of the Above Authorities to An Estate of Curtesy.

We have made the foregoing recitation of the facts surrounding the dissolution of the tribal governments and the selection of allotments of land in severalty and have

cited the Oklahoma Supreme Court, the Circuit Court of Appeals and the decisions of this Court as giving the basic principles underlying the decision of the Oklahoma Supreme Court wherein it held that a surviving spouse was entitled to a life estate of curtesy or dower in the lands of the deceased spouse, whether the selection was made before or after the death of the allottee.

In the case of *Cook* v. *Childs*, 49 Okla. 321, the Supreme Court of Oklahoma passed upon the question of dower in the allotment of a deceased member of the Choctaw Tribe of Indians, wherein the allotment was selected after the death of the allottee, and we desire to call the court's special attention to this decision not only as being controlling, as respesenting the interpretation by the State Court of a local law, but also because the reasoning in said case is clear, cogent and convincing.

> "As stated, much stress is laid on the fact in the briefs and oral argument of counsel that at the time of his death the allottee was vested with no actual seisin of the property and had no inheritable interest or estate therein, but the effect of section 22 was to cause the provisions of Chapter 49 to apply to and govern the devolution of the property when so selected by his administrator, in the same manner and with the same effect as if such property had been allotted in his lifetime and had descended to his heirs * * *.
>
> "Thus it is seen that lands to which deceased would have been entitled after having been selected in his name by the administrator under the provisions of

section 22, and of Chapter 49, Mans. Dig., descend to his heirs in the same manner and in the same proportion that they would have descended had he selected the same in his lifetime and have been seized thereof at the time of his death; but for these provisions the heirs themselves would have no right thereto by virtue of the fact that they stand in the relation of kinsmen to the deceased; and their rights to participate in the distribution of his share depends wholly upon these provisions and attach to the property at the time of selection.

"It is urged in the argument that because by the terms of section 22, it is provided that the lands of a deceased Indian, when allotted in his name by an administrator, shall descend to his heirs, the use of the word 'heirs' means the lands shall descend to the 'heirs' to the exclusion of the widow, and that, because she was not named in section 22, the intention was manifest that she was not to be considered in the descent and distribution of these lands; but it will be noticed that this same section, 22, says said property shall descend to the heirs 'according to the laws of descent and distribution as provided in Mans. Digest, Chapter 49, of the Statutes of Arkansas.'

"When we consider the legislation of Congress and its dealings with the tribes, in reference to the tribal property and affairs, we are forced to conclude that, when a definite time was fixed by which it was determined that all Indians living upon that date and whose enrollment should be finally approved were entitled to participate in the allotment of the tribal lands and other tribal property; it was not the intention of Congress to create any inequalities among the citizens whose names should appear upon the rolls, completed in accordance with the legislation, but that each one should participate in the same manner and to the same extent in the distribution of tribal

property. It was never intended that of two citizens duly enrolled, each of whom was entitled to share in the tribal property, where one had selected his allotment and died, his widow would be endowed in his lands, and the widow of the other who died before making his selection, should be excluded, even though he died in point of time later than the one who, in fact, made his selection * * *.

"To our minds, it is clear that it was the intention of Congress and of the tribes to provide that the property of the class mentioned in section 22, should be governed by the same law and descend in the same manner to the same persons and in the same proportion as other tribal property of like character, would descend, and by these provisions, to obviate the necessity of actual seisin, creating as it were a seisin by operation of law, and that the purpose and intention of incorporating said section 22 in the act was to remove from the realm of doubt and make certain the intention that property of this class should descend under the provisions of Chapter 49, whereas it might have been doubtful and the cause of some speculation as to how it should descend had this provision not been incorporated therein."

In *Morris v. Sweeney*, 53 Okla. 163, the same court considered the right of curtesy in an allotment selected after the death of the allottee and after citing Cook vs. Childs, as authority, says:

"By parity of reasoning in the instant case, the enrollment of the deceased, Arran Ann Sweeney, having been finally approved, her lands would descend in the manner, as it would have descended had patent issued during her lifetime."

The decision of the Oklahoma Court in the instant

case is based on the case of Morris vs. Sweeney, wherein it was held in the year 1915, upon identical state of facts, that the husband was entitled to a curtesy.

Section 2534 of Mansfield's Digest, Chapter 49, provided for curtesy by the following language:

> "In all cases not provided for by this act, the inheritance shall descend according to the course of the common law."

Under this provision curtesy had been recognized and enforced by the Court of Arkansas. it is immaterial whether curtesy had also been provided by the Act of Congress, May 2nd, 1890, as contended by counsel for appellant.

The decisions of the Supreme Court of Oklahoma answer every argument of appellant as to the seisin required for an estate of curtesy.

The Supreme Court of Oklahoma has, in a long line of cases, held that curtesy exists in favor of a husband of a deceased allottee.

> ***Johnson*** v. ***Simpson***, 40 Okla. 139, 139 Pac. 129.
> ***Pierce*** v. ***Ellis***, 51 Okla 710, 152 Pac. 340.
> ***Morris*** v. ***Sweeney***, *supra*.
> ***Bridges*** v. ***Wright***, 56 Okla. 10, 155 Pac. 883.
> ***Miles*** v. ***Miles***, 73 Okla. 198, 175 Pac. 222.
> ***Kenoly*** v. ***Hanley***, 84 Okla. 120, 202 Pac. 494.
> ***Condren*** v. ***Martin***, 113 Okla. 259, 241 Pac. 826.

These decisons have established a rule of property

and the Supreme Court will not overturn a local rule of construction which for years has governed the transfer of property.

Reynolds v. *Frizell*, 236 U. S. 58.

We again call the court's attention to our motion to dismiss, and the authorities therein cited that no substantial Federal question is involved, but that when the Arkansas law was adopted by the Act of Congress it became a local law and the interpretation thereof by the proper local tribunal is conclusive, and the Supreme Court will accept as controling a decision of the state court on questions of local law, both statutory and common.

Amr. Ky. Express Co. v. *Commonwealth of Ky.*, No. 5, decided Feb. 21, 1927, 47 S. Ct. 353.
Parker v. *Oklahoma Oil Co.*, 218 Fed 380.
Shulthis v. *McDougal*, 225 U. S. 561.

To summarize, it seems plain that Congress intended to abolish all distinction between lands inherited in a technical sense, and lands allotted in the name of a deceased allottee. It was intended to make this allotment of Mary E. Puckett a part of her estate and to have it descend to her heirs as though patent had issued to her during her lifetime. It is conceded that, had patent issued during the lifetime of the allottee, all of the essential elements of curtesy would have been present, and the clear and distinct expression by the Supreme Court

of the United States, in *Harris* v. *Bell*, *supra*, is that title passed to the heirs as if selection was made in the lifetime of the allottee, thereby eliminating the idea that there could be any distinction between lands selected in the lifetime and lands selected by an administrator. This being true, curtesy must attach in favor of the surviving husband of Mary E. Puckett.

White Husband of Choctaw Citizen Can Inherit.

It is contended that G. N. Puckett, not being a citizen of the Choctaw Nation, could not inherit the lands of his deceased wife. Whether curtesy came by descent or by reason of the marriage relation is immaterial, as we will presently show.

The case of *Condren* v. *Marlin*, *supra*, was construing the provisions of the Creek agreement which contained the proviso:

> "That only citizens of the Creek Nation, male and female, shall inherit lands of the Creek Nation."
>
> Supplemental Creek Agreement (21 St. 500).

No such provision is found in the acts relating to the Chickasaw and Choctaw Nations. The only condition under which the estate of a Choctaw Indian went back to the blood of the ancestor was that provided in section 2531, Chapter 49, of Mansfield's Digest of the Statutes of Arkansas:

> "In cases where the intestate shall die without

descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs * * *."

In the instant case, Mary E. Puckett had descendants, living children of her first marriage, and a child born to her and G. N. Puckett. All of these children were living when this cause was tried in the District Court of Jefferson County, Oklahoma. In *Hawkins Estate*, 97 Okla. 195, no issue was living and hence the provision above quoted caused the estate to ascend as an ancestral estate.

Hence the argument that G. N. Puckett could not take by reason of not being of Indian blood, under the facts of the case, has no basis in the laws applicable to the Choctaw Indians. Sections 2522 and 2534 of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas construed together provide for curtesy in the husband and a remainder in equal share to the children of the deceased or their descendants by right of representation. It is immaterial whether curtesy existed by descent or by virtue of the marriage relation, since there is no inhibition against the inheritance by a non-citizen of the Choctaw Tribes inheriting the property of his deceased wife where there were descendants.

That the distinction between the provisions of the Creek and Chickasaw Choctaw Supplemental Agreements

is as we contend is further supported by the fact that in every case cited by counsel for appellant either one of two conditions exist, first, the allottee left no descendants, in which case, if the proper came by the blood of the ancestor it would ascend as an ancestraal estate; or, second, the case involved a Creek allotment wherein it was provided in the Supplemental Creek Agreement that only citizens of the Creek Nation shall inherit.

That non-citizens could inherit unless specifically prohibited by Act of Congress, as in case of the Creek Supplemental Agreement, has become a rule of property and the Supreme Court will not overturn a local rule of construction which for years has governed the transfer of property.

Reynolds v. *Fewell*, 236 U. S. 58.

In view of the facts stated and the authorities cited, we believe the judgment of the Supreme Court of Oklahoma should be affirmed.

Respectfully submitted,

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